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# LONGER THAN THE OLD TESTAMENT, MORE CONFUSING THAN THE TAX CODE:<sup>1</sup> AN ANALYSIS OF THE 1992 CABLE ACT

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"[O]ne of the greatest savings in the face of monopoly pricing in the history of American business" may finally be in sight.<sup>2</sup> Or is it? Following years of consumer complaints, Congress enacted the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act").<sup>3</sup> The 1992 Cable Act set basic standards for cable regulation, and authorized the Federal Communications Commission ("FCC" or "Commission") to implement detailed regulations that would effectuate the 1992 Cable Act's objectives.<sup>4</sup> This resulted in a mammoth rate regulation *Report and Order* released by the FCC on May 3, 1993.<sup>5</sup> The *Rate Order*, however, has not been as effective as originally planned. In fact, on February 22, 1994, the FCC adopted a *Second Order on Reconsideration*<sup>6</sup> modifying its previous cable television rate regulation scheme. In the *Second Rate Order*, the Commission required cable systems to reduce rates by seventeen percent from the September 1992 levels.<sup>7</sup> FCC Chairman Reed Hundt claimed that cable consumers could now expect up to \$3 billion dollars in cable bill savings.<sup>8</sup>

The FCC and Congress hope that the additional

cable rate reduction will quell, at least for the moment, the debate that has raged over the last twelve months. When the 1992 Cable Act became law on October 5, 1992, it was heralded as a breakthrough; a solution to consumer complaints of skyrocketing rates and abysmal service.<sup>9</sup> It appears, however, that the 1992 Cable Act's promise may have been premature. Criticism of the 1992 Cable Act has intensified recently, with the brunt of such criticism directed at the most important goal of the Act—lowering the prices consumers pay for cable service.<sup>10</sup>

The 1992 Cable Act directed the FCC to ensure that basic cable television rates remain "reasonable."<sup>11</sup> The effect of the Act, in many instances, however, has been to raise basic rates, not lower them.

This Comment analyzes the reasons behind the failed objectives of the 1992 Cable Act and briefly traces events that occurred preceding, and subsequent to, the promulgation of the 1992 Cable Act. Part I tracks the history of cable rate regulation and Congress's subsequent decision to deregulate the cable television industry in 1984. Part II outlines

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<sup>1</sup> *FCC Plans Tutorial; Cable Officials Say It Will Take Weeks To Assess Impact of Rate Benchmarks*, COMM. DAILY, May 5, 1993, at 2 (statement by Community Antenna Television Association President Stephen Effros).

<sup>2</sup> David Lieberman, *FCC Orders Cable Rates Cut Up To 7%*, USA TODAY, Feb. 23, 1994, at A1 (quoting FCC Chairman Reed Hundt).

<sup>3</sup> Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, 1465 (1992)(to be codified as amended at 47 U.S.C. §§ 521-555).

<sup>4</sup> *In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd. 5631 (1993)[hereinafter *Rate Order*]; see also *Notice of Proposed Rule Making*, 8 FCC Rcd. 510 (1992).

<sup>5</sup> *Id.*

<sup>6</sup> *In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Second Or-*

*der on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rule Making* in MM Dkt. No. 92-266, FCC 94-38, para. 1 (Feb. 22, 1994) [hereinafter *Second Rate Order*].

<sup>7</sup> *Id.* para. 19. This marked the second time in less than a year that the Commission reduced cable rates. The FCC had first established a 10% reduction in September 1992. *Rate Order*, *supra* note 4, para. 15.

<sup>8</sup> Lieberman, *supra* note 2, at A1.

<sup>9</sup> Although President Bush originally vetoed S. 12, the U.S. Senate voted 74-25 to override the veto. See 138 Cong. Rec. S16,676 (daily ed. Oct. 5, 1992). The U.S. House of Representatives followed suit the same day. See 138 Cong. Rec. H11,487-88 (daily ed. Oct. 5, 1992).

<sup>10</sup> S. Rep. No. 92, 102d Cong., 1st Sess. 1 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1133 [hereinafter *Senate Report*]( "[t]he purpose of this legislation is to . . . provide protection for consumers against monopoly rates").

<sup>11</sup> Pub. L. No. 102-385, § 623(b)(1).

how and why the federal government undertook to reregulate cable rates, including the scheme the Commission proposed to utilize. Part III analyzes what went wrong, and how the goals of the 1992 Cable Act may have been frustrated through poor draftsmanship and lack of foresight. Part IV finds that had Congress and the Commission been privy to the realities of the cable industry, the 1992 Cable Act's rate regulation provisions could have been more properly tailored to meet the Act's goals.

## I. CABLE REGULATION PRIOR TO THE 1992 CABLE ACT

The FCC began regulating the cable industry in the mid-1960s,<sup>12</sup> justifying its regulatory stance with the argument that cable television threatened the viability of the broadcast medium.<sup>13</sup> As a result, the FCC began to assert increasing regulatory power over cable television.<sup>14</sup> The Supreme Court affirmed this broad power, but limited it to that which was "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."<sup>15</sup> The result was a program of "deliberately structured dualism," whereby federal and state regulators split jurisdictional responsibility for the regulation of the cable industry.<sup>16</sup> Local authorities granted franchises to cable operators, outlined franchise areas, oversaw the construction of cable facilities and preserved rights-of-way,<sup>17</sup> while federal regulators maintained exclusive jurisdiction over all operational aspects of cable television, including technical standards, signal carriage and pay cable.<sup>18</sup>

This broad delineation of regulatory powers be-

tween the two bodies was bound to result in conflict. In *Capital Cities Cable, Inc. v. Crisp*,<sup>19</sup> the Supreme Court clarified the boundaries of this dual jurisdictional authority, holding that the FCC's regulatory authority superseded the states' own broad regulatory powers.<sup>20</sup> This is not to say that the states no longer enjoyed any regulatory powers with regard to cable television. However, those powers it did possess were dictated by the Commission:

Thus, we have consistently taken the position that to the degree we deem necessary, we will preempt areas of cable regulation in order to assure the orderly development of this new technology into the national communications structure. At the same time, we have attempted . . . to leave a significant amount of regulatory responsibility at the non-federal level.<sup>21</sup>

### A. The Cable Communications Policy Act of 1984

The Cable Communications Policy Act of 1984 ("1984 Cable Act") embodied, for the first time, a congressional attempt to formulate a national regulatory policy for cable television.<sup>22</sup> Simply put, the 1984 Cable Act was the cable industry's bill, designed to "[m]inimize unnecessary regulation that would impose an undue economic burden on cable systems."<sup>23</sup> The 1984 Cable Act's legislative history indicates that the impetus of the Act was to establish "a uniform national policy for broadband telecommunications [that could] serve to eliminate and prevent conflicting counterproductive regulations so that cable [could] be a competitive medium."<sup>24</sup> With the 1984 Cable Act, Congress endeavored to create a scheme whereby local franchise authorities shared

<sup>12</sup> See *In re Amendment of Subpart L, Part 91, To Adopt Rules and Regulations To Govern the Grant of Authorizations in the Business Radio Service for Microwave Stations to Relay Television Signals to Community Antenna Systems*, *Second Report and Order*, 2 F.C.C.2d 725 (1966), *aff'd sub nom.* Black Hills Video Corp. v. FCC, 399 F.2d 65 (8th Cir. 1968).

<sup>13</sup> *Id.* at 782. Specifically, the Commission felt that many ultra high frequency ("UHF") television stations were failing due to the cable industry. *Id.*

<sup>14</sup> See *In re Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems*, *Report and Order*, 36 F.C.C.2d 143 (1972)(codified at 47 C.F.R. §§ 76.57, 76.59, 76.61), *aff'd sub nom.* ACLU v. FCC, 523 F.2d 1344 (9th Cir. 1975) [hereinafter *1972 Cable Television Report and Order*]. The *1972 Cable Television Report and Order* established a number of significant regulations for cable systems, including the requirements to carry local television stations ("must-carry" rules) and the limitation on the number of distant television stations a cable system could carry ("market quota" rules).

<sup>15</sup> *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968).

<sup>16</sup> *1972 Cable Television Report and Order*, *supra* note 14, para. 177.

<sup>17</sup> *Id.* paras. 177-188.

<sup>18</sup> *In re Amendment of Part 76 of the Commission's Rules and Regulations Relative to an Inquiry on the Need for Additional Rules in the Area of Duplicative and Excessive Over-Regulation of Cable Television*, *Report and Order*, 54 F.C.C.2d 855, para. 25 (1975) [hereinafter *Over-Regulation Report and Order*].

<sup>19</sup> 467 U.S. 691 (1984).

<sup>20</sup> *Id.* at 704.

<sup>21</sup> *Over-Regulation Report and Order*, *supra* note 18, para. 24.

<sup>22</sup> Pub. L. No. 98-549, 98 Stat. 2779 (1984)(codified at 47 U.S.C. § 521-559 (1992)).

<sup>23</sup> 47 U.S.C. § 521(6) (1988).

<sup>24</sup> See S. Rep. No. 67, 98th Cong., 1st Sess. 17 (1983).

authority with the FCC.<sup>25</sup> Before the 1984 Cable Act was enacted, local franchising authorities could regulate rates for basic cable service.<sup>26</sup> The 1984 Cable Act stripped local franchising authorities of this power and permitted them to regulate cable rates only to the extent "effective competition" did not exist.<sup>27</sup> "Effective competition" was defined as the presence of "at least three unduplicated television signals" in the cable community.<sup>28</sup> These three signals could be any broadcast signal that placed a "Grade B Contour"<sup>29</sup> over any portion of the cable community; was deemed "significantly viewed" within a cable community;<sup>30</sup> or was transmitted from a translator station located within the cable community.<sup>31</sup> The effective competition standard ensured that ninety-six percent of all cable communities would not be subject to rate regulation.<sup>32</sup>

As noted above, the purpose and effect of the 1984 Cable Act was not regulation, but deregulation. Congress envisioned deregulation as the stimulus needed to spark a boom in cable television "benefiting both consumers and industry participants alike."<sup>33</sup> Additionally, Congress hoped that competing programming sources would emerge, thereby keeping rates low.<sup>34</sup>

## B. The Effects of Deregulation

By the early 1990s, the majority of Congress's stated objectives under the 1984 Cable Act became a reality. One objective was to develop cable television into a pervasive presence in American households. According to H.R. 102-628 to the 1992 Cable Act, cable penetration stood at sixty-one percent of Amer-

ican homes in 1992, up from thirty-seven percent in 1985.<sup>35</sup>

The checks and balances Congress envisioned to keep cable television rates from skyrocketing, however, did not occur. In fact, the cable television industry was not providing the low rates and quality of service Congress anticipated with the passage of the 1984 Cable Act.<sup>36</sup> Furthermore, competition from other video programming technologies, such as satellite service and wireless cable, never materialized, leaving cable television with monopoly market power.<sup>37</sup> Without effective competition from other technologies, nothing prevented cable operators from charging exorbitant rates.

As a result, Representative Edward J. Markey (D-Ma.), Chairman of the House Subcommittee on Telecommunications and Finance, ordered the Government Accounting Office ("GAO") to conduct a survey of existing cable systems to determine the status of the deregulated cable television industry.<sup>38</sup> The GAO surveyed 2,000 of the 11,000 existing cable systems and received approximately 1,500 responses.<sup>39</sup> The survey concluded that since deregulation under the 1984 Cable Act, monthly rates for the lowest-priced basic cable service had risen twenty-nine percent and rates for the most popular basic cable service had risen twenty-six percent.<sup>40</sup> These increases constituted three times the Consumer Price Index.<sup>41</sup> The most disturbing aspect of the study was that the high cable rates were attributable not to the increasing cost of service, but to the cable television industry's market power.<sup>42</sup>

In response to the GAO study, the Commission re-defined the term "effective competition" to subject

<sup>25</sup> See H.R. Rep. No. 934, 98th Cong., 2d Sess. 19, 24 (1984)(characterizing local franchise authorities as the "primary means of cable television regulation"); 47 U.S.C. § 521 (1988) (giving the Commission jurisdiction over cable under the Communications Act of 1934).

<sup>26</sup> *In re* Amendment of Part 76 of the Commission's Rules and Regulations Relative to the Advisability of Federal Preemption of Cable Television Technical Standards or the Imposition of a Moratorium on Non-Federal Standards, Notice, 46 F.C.C.2d 175, para. 84 (1974). "Basic cable service" is defined as service regularly provided to all cable subscribers, as opposed to "pay cable service," that includes Home Box Office, Cinemax, Showtime and others. *Id.*

<sup>27</sup> 47 U.S.C. § 523 (1988).

<sup>28</sup> 47 C.F.R. § 76.33(a)(2) (1985).

<sup>29</sup> *Id.* Grade B Contours indicate the approximate extent of coverage over average terrain in the absence of interference from other television stations. These contours vary from station to station. 47 C.F.R. § 73.683(a) (1992).

<sup>30</sup> *Id.* The 1972 Cable Television Report and Order, *supra*

note 14, undertook to determine the initial list of "significantly viewed" stations, found in so-called "Appendix B" of Part 76 of the Rules, and § 76.54 specifies the mechanism for new stations to be deemed significantly viewed.

<sup>31</sup> 47 C.F.R. § 76.33(a) (1985).

<sup>32</sup> H.R. Rep. No. 628, 102d Cong., 2d Sess. 31 (1992) [hereinafter House Report].

<sup>33</sup> *Id.* at 29.

<sup>34</sup> *Id.* at 30.

<sup>35</sup> *Id.* at 29.

<sup>36</sup> *Id.* at 29-30.

<sup>37</sup> *Id.* at 30. In fact, these competing technologies have only a five percent penetration in American households. *Id.*

<sup>38</sup> *Id.* at 31.

<sup>39</sup> Senate Report, *supra* note 10, at 5.

<sup>40</sup> *Id.* It should be noted that these figures only constitute an average number. The worst offenders increased basic cable rates anywhere from 94% to 204%. *Id.* at 5-6.

<sup>41</sup> H.R. Rep. No. 862, 102d Cong., 2d Sess. 55 (1992).

<sup>42</sup> *Id.*

more cable systems to rate regulation.<sup>43</sup> This effort, however, provided relief to only twenty percent of cable subscribers.<sup>44</sup> As a result, it became clear that Congress would again intervene.

## II. REGULATION REVISITED - THE 1992 CABLE ACT

The 1984 Cable Act was implemented to serve the needs of the cable industry. Under the 1992 Cable Act, local franchising authorities and the FCC jointly regulate the rates of cable companies.<sup>45</sup> Rates for the basic cable service tier are subject to rate regulation by the local franchising authorities, as long as the Commission "certifies" that the rules adopted by local franchising authorities are consistent with FCC regulations.<sup>46</sup> Rates for cable programming services other than the programming carried by the basic tier are to be regulated by the Commission only if a complaint is made, and then only if the Commission finds such rates to be "unreasonable."<sup>47</sup> Programming offered on a per program or per channel basis is not subject to rate regulation.<sup>48</sup>

The 1992 Cable Act also requires that rates for equipment and installations be separated from other basic tier rates,<sup>49</sup> the so-called "unbundling" of equipment. Thus, cable subscribers will pay separate charges "for each significantly different type of remote, converter box and installation."<sup>50</sup> Equipment and installation charges must be "unbundled" in order to apply the separate equipment and programming service standards required by the Act.<sup>51</sup> Under the FCC's "actual cost" standard, a cable operator must create an equipment basket "to which it will assign the direct costs of service installation, addi-

tional outlets and leasing and repairing equipment."<sup>52</sup> The equipment basket may not include a cable operator's direct costs of equipment sold to customers.<sup>53</sup>

### A. Effective Competition

First and foremost, the 1992 Cable Act strives to curb the substantial market power the cable industry can assert over subscribers, programmers and potential competitors.<sup>54</sup> The 1992 Cable Act creates a rebuttable presumption that all cable systems are not subject to "effective competition" and states that cable systems not subject to "effective competition" are subject to rate regulation.<sup>55</sup> Section 623 of the Act provides that "effective competition" exists when:

- (a) fewer than 30 percent of the households in the franchise area subscribe to a cable system; (b) the franchise area is served by at least two unaffiliated multichannel video programming distributors each of which offers comparable video programming to at least 50 percent of the households in the franchise area and the number of households subscribing to programming services offered by multichannel video programming distributors exceeds 15 percent of the households in the franchise area; or (3) the franchising authority in the subject franchise area is itself a multichannel video programming distributor and offers video programming to at least 50 percent of the households in that franchise area.<sup>56</sup>

Unlike the 1984 Cable Act, where the "effective competition" standard subjected only three percent of cable areas to rate regulation, the 1992 Cable Act attempted to ensure that virtually every cable system would be subject to rate regulation.

<sup>43</sup> *In re* Re-examination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates, *Report and Order and Second Further Notice of Proposed Rule Making*, 6 FCC Rcd. 4545, para. 1 (1991).

<sup>44</sup> *Id.*

<sup>45</sup> *Rate Order*, *supra* note 4, para. 2.

<sup>46</sup> *Id.* para. 3. If the Commission determines that the local franchising authority has not met the requirements of section 623 (a)(3), the local franchise authority may revise or modify its certification. If the FCC still refuses to certify the local franchising authority, section 623(a)(6) grants the Commission jurisdiction over rate regulation of the basic service tier. *See In re* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, *Rate Regulation, Notice of Proposed Rule Making*, 8 FCC Rcd. 510, paras. 23-24 (1992) [hereinafter *Rate Regulation NPRM*].

<sup>47</sup> Pub. L. No. 102-385, § 623(c).

<sup>48</sup> *Rate Order*, *supra* note 4, para. 4.

<sup>49</sup> *Id.* para. 284. However, small cable systems, those serving less than 1,000 subscribers, are exempt from this requirement

and instead may make rate reductions by reducing each regulated billed item by 14% (which equals the 17% competitive differential reduced by approximately 3% inflation that occurred between October 1992 and September 1993). *Second Rate Order*, *supra* note 6, para. 41.

<sup>50</sup> *Rate Order*, *supra* note 4, para. 288.

<sup>51</sup> *Id.* para. 287.

<sup>52</sup> *Id.* para. 295.

<sup>53</sup> *Id.* para. 295 n.713. Nevertheless, the equipment basket may include a slight profit margin not to exceed 11.25%. *Id.* para. 295 n.715.

<sup>54</sup> Senate Report, *supra* note 10, at 9-11.

<sup>55</sup> 47 U.S.C. § 543(a)(2) (1988). Both the 1984 and 1992 Cable Acts conclude that cable systems under "effective competition" are not subject to rate regulation. The difference, however, is in the definition of "effective competition." *Compare* Pub. L. No. 102-385, § 623(a)(2) with 47 U.S.C. § 523 (1988).

<sup>56</sup> Pub. L. No. 102-385, § 623(1)(1)(B), (C) (to be codified at 47 U.S.C. § 543(a)(2)).

## B. The Benchmarks

In requiring that rates could not be "unreasonable," Congress merely stated that the FCC's regulations had to be designed to achieve statutory goals and to take into account statutory factors.<sup>67</sup> Congress left the determination of what a reasonable rate should be to the FCC and state and local governments.<sup>68</sup> Pursuant to congressional intent, the Commission began the arduous task of defining what in fact was a "reasonable rate" with the issuance of a *Notice of Proposed Rule Making*.<sup>69</sup> The result was the voluminous *Rate Order*.<sup>60</sup>

The *Rate Order* established a regulatory system based on "benchmark" formulas.<sup>61</sup> The benchmark system presumes that current cable rates for the basic service tier not under effective competition reflect pervasive market power.<sup>62</sup> Therefore, by calculating the average difference between rates subject to effective competition and those that are not, the Commission took the next logical step in determining "reasonable" rates. Upon conducting a survey of rates as of September 30, 1992, the Commission found that rates not subject to effective competition were, on the average, ten percent higher than rates subject to effective competition.<sup>63</sup> As a result, the FCC permitted local franchising authorities to "rollback" basic cable rates ten percent if the system was not subject to effective competition and its rates exceeded the benchmarks by ten percent.<sup>64</sup> Rates charged by cable systems for the basic service tier are compared to a table of benchmarks established by the FCC based on the average September 30, 1992 rates of systems subject to effective competition.<sup>65</sup> This table of benchmarks takes into account three significant factors: the number of subscribers, the number of regu-

lated channels, and the number of regulated satellite-delivered signals.<sup>66</sup> The initial regulated rate for such a system will be its rate in effect on the date the system becomes subject to regulation.<sup>67</sup>

## C. The Price Cap

In order to be effective, the Commission recognized that rate regulation must not ignore economic realities, such as inflation and other factors that impair a cable operator's ability to recover costs. Thus, the FCC instituted a price cap mechanism to regulate future increases in cable rates once the initial rate proceeding was completed. This price cap system ensures that future rate increases remain within reasonable limits.<sup>68</sup>

Once regulated rates are determined, the price cap mechanism incorporates an annual adjustment index that permits changes in each system's cap for the basic tier.<sup>69</sup> The Commission adopted the GNP fixed weight price index ("GNP-PI") as the annual adjustment index.<sup>70</sup> In effect, cable operators may adjust the capped base per channel rate for the basic service tier each year after the final GNP-PI is published for the preceding year.<sup>71</sup> Capped rates may be adjusted annually for inflation.<sup>72</sup>

Additionally, cable operators may pass along to subscribers certain categories of "external costs" if such costs exceed inflation. These categories include the costs of retransmission consent fees incurred after October 6, 1994, other programming cost increases, taxes, and the costs of franchise fees and franchise requirements including public, educational and government ("PEG") access channels.<sup>73</sup>

<sup>67</sup> *Rate Order*, *supra* note 4, App. A at 12.

<sup>68</sup> *Id.* para. 2.

<sup>69</sup> *Rate Regulation NPRM*, *supra* note 46.

<sup>60</sup> *Rate Order*, *supra* note 4.

<sup>61</sup> *Id.* paras. 185-188.

<sup>62</sup> *Id.* App. A at 3.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* The Commission will also be permitted to rollback rates for cable programming services on the basis of individual complaints if those rates are not subject to effective competition. *Id.* However, if a cable operator already charges rates at or below the benchmark, no rollback will be instituted.

<sup>65</sup> *Id.* App. A at 14.

<sup>66</sup> *Id.* para. 214.

<sup>67</sup> *In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, First Order on Reconsideration, Second Report and Order, and Third Notice Of Proposed Rule Making*, 58 Fed. Reg. 46,718 (1993) [hereinafter *Rate Reconsideration Order*]. Rate

regulations were to take effect on June 21, 1993. The FCC however deferred the effective date until October 1, 1993 based on "resource constraints." *In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Order*, 58 Fed. Reg. 33,560, para. 2, 73 Rad. Reg. 2d (P&F) 14 (1993) [hereinafter *Rate Regulation Deferral*]. Significantly, political pressure led the Commission to revise the effective date of rules establishing rate regulation once again to an earlier date, from October 1, 1993 to September 1, 1993. *In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Order*, 58 Fed. Reg. 41,042 (1993). Individual cable systems are not subject to rate regulation until notified by local authorities.

<sup>68</sup> *Rate Order*, *supra* note 4, App. A at 15.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Rate Reconsideration Order*, *supra* note 67, para. 87.

<sup>73</sup> *Rate Order*, *supra* note 4, paras. 246-254.

## D. The Cable Rate Freeze

In April 1993, the Commission feared that cable operators would raise basic tier rates before the 1992 Cable Act came into effect in an attempt to recover anticipated lost profits resulting from the new regulations. Consequently, on the same day the FCC established rules implementing rate regulation,<sup>74</sup> it also adopted a "rate freeze" applicable to all cable systems not subject to effective competition.<sup>75</sup> In addition to preventing rate increases, the Commission concluded that the "rate freeze" would give local franchising authorities time to establish their certification for regulation of basic service tier rates and give consumers time to become familiar with the new local and federal rules.<sup>76</sup>

Essentially, the rate freeze prohibited the average monthly subscriber bill for services subject to rate regulation from rising above the average monthly bill as determined on April 15, 1993.<sup>77</sup> According to the Commission, the average monthly bill must be calculated by "determining for a monthly billing cycle the sum of all billed monthly charges for all cable services subject to regulation under Section 623 of the Communications Act and dividing that sum by the number of subscribers receiving any of those services."<sup>78</sup> This freeze, however, does not prevent cable operators from adding subscribers, retiering, or adding additional program services as long as the total average bill does not increase.<sup>79</sup> The rate increase freeze was to be in effect for only 120 days, until August 15, 1993.<sup>80</sup>

Predictably, cable operators and its advocates charged that the 1992 Cable Act and its rate regulation provisions would strike a fatal blow to the emerging cable industry. Following the Commission's *Rate Order* and *Rate Freeze Order*, the National Cable Television Association ("NCTA") and

its then-President James Mooney denounced the FCC's actions:

At a minimum, it appears that these rules will make it very difficult for us to satisfy the expectations of our subscribers for quality programming and services. These things [quality programming and services] are expensive to provide, and rate rollbacks, while always temporarily popular, almost always are destructive to quality."<sup>81</sup>

Mooney also alleged that the Commission had "misconstrued" the 1992 Cable Act by "ordering across-the-board rollbacks of rates for upper-tier or cable programming services," which, in effect, "disregarded Congress's instruction that such rates be regulated only in response to complaints . . . ."<sup>82</sup> Mooney hinted that the FCC's actions could form the basis for a court appeal.<sup>83</sup>

Additionally, cable operators argued that the Commission's rate regulations were overly burdensome, difficult to construe, and made compliance virtually impossible. In fact, FCC officials agreed that although the benchmarks themselves were clear, very few cable systems had the equipment cost information needed to determine how much rates were to be lowered or even whether their rates were actually below the benchmark at all.<sup>84</sup> Small cable operators were particularly frustrated. Community Antenna Television Association ("CATA") President Stephen Effros claimed that the rules "were clearly written by Common Carrier Bureau people who apparently were not aware that they call for figures that the cable industry doesn't have . . . [t]he FCC has written something that is longer than the Old Testament and more confusing than the tax code, all in one document."<sup>85</sup>

In May 1993, NCTA filed a petition with the Commission for a limited stay of the June 21, 1993 effective date of the 1992 Cable Act rate regula-

<sup>74</sup> *Id.*

<sup>75</sup> *In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Order*, 8 FCC Rcd 2921, para. 3 (1993)[hereinafter *Rate Freeze Order*]. This rate freeze has been extended numerous times, culminating in an expiration date of May 15, 1994. See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, 8 FCC Rcd. 2921 (1993), *clarified*, 8 FCC Rcd. 2917, (1993), *extended*, 58 Fed. Reg. 33,560, 73 Rad. Reg. 2d (P&F) 14 (1993), *extended*, 58 Fed. Reg. 60,141, 74 Rad. Reg. 2d (P&F) 13 (1993), *extended*, 59 Fed. Reg. 6901, 74 Rad. Reg. 2d (P&F) 732 (1994).

<sup>76</sup> *Rate Freeze Order*, *supra* note 75, para. 3 (1993).

<sup>77</sup> *Id.* para. 4. The FCC did provide some relief to cable operators by agreeing to entertain petitions for emergency relief from those systems that could show the rate freeze "would impose severe economic hardship or threaten the viability of contin-

ued cable service." *Id.* para. 3 n.6. Nevertheless, such a burden of proof is so high that all cable systems would effectively be subject to the rate freeze. *FCC Freezes Cable Rates, Sets Stage For \$1 Billion Rollback*, COMM. DAILY, Apr. 2, 1993, at 1 (quoting Alexandra Wilson of the Mass Media Bureau).

<sup>78</sup> *Rate Freeze Order*, *supra* note 75, para. 3 n.7.

<sup>79</sup> *Id.* para. 4.

<sup>80</sup> *Id.* para. 1.

<sup>81</sup> *NCTA Denounces Cable Rate Rules*, FCC REP., Apr. 7, 1993, at 11.

<sup>82</sup> Joe Flint, *Rate Rules "Pretty Much As Advertised," BROADCASTING & CABLE*, May 10, 1993, at 5, 14.

<sup>83</sup> *Id.*

<sup>84</sup> *FCC Plans Tutorial; Cable Officials Say It Will Take Weeks To Assess Impact of Rate Benchmarks*, COMM. DAILY, May 5, 1993, at 2.

<sup>85</sup> *Id.* at 3.

tions.<sup>86</sup> NCTA argued that it required more time to "make reasonable changes in service offerings," given the time it would take to digest the voluminous 586-page *Rate Order*, gather the requisite information, and apply the necessary formulas.<sup>87</sup>

The fact that the Commission denied NCTA's petition was neither surprising nor in the end significant. What was telling, however, was a concurring statement issued by FCC Commissioner Andrew C. Barrett, in which he expressed concern over the rush to implement the 1992 Cable Act and its provisions:

I do not believe that the [Rate] Order sufficiently explains the basis for a June 21 effective date deadline, in light of the market-based actions required to comply with our . . . rate regulation order, and the rate implications of other 1992 Cable Act requirements . . . I also remain aware that companies need reasonable periods of time to assess the full impact of these complex regulations, bring their operations into compliance, and realign their employee efforts.<sup>88</sup>

This statement would be a sign of things to come. Although cable operators had petitioned the Commission for an extension of the deadline, it was the Commission itself that in the end bowed to the 1992 Cable Act's overwhelming requirements.<sup>89</sup> On June 11, 1993, the FCC deferred implementation of the rate regulation provisions until October 1, 1993, and extended the rate freeze until November 15, 1993.<sup>90</sup> The Commission's reason for the deferral was the same reason cable operators had been advancing since the beginning of the debate over the 1992 Cable Act; that rate regulation provisions were complicated and costly.<sup>91</sup>

Citing that it was already operating under a budget shortfall of \$18 million for fiscal year 1993, the FCC concluded that additional appropriations from Congress were necessary in order to achieve the 1992 Cable Act's objectives.<sup>92</sup> All three FCC Commissioners wrote members of Congress indicating that the only alternative was to implement the rules as scheduled; however, this would entail notifying franchise authorities and consumers that FCC mail responses, certifications, etc., would be "substantially

delayed pending supplementary funding."<sup>93</sup> Additionally, the Commissioners hinted that enforcement of other regulatory matters would be delayed without appropriate funding.<sup>94</sup> The Commission concluded that the additional period of time would "ensure a smooth transition to rate regulation" by allowing cable operators and franchising authorities more time to implement and comply with the new rate regulations.<sup>95</sup>

Although the cable industry breathed a sigh of relief, congressional leaders were not sympathetic to the FCC's concerns. Representative Markey reacted angrily:

[T]he lack of resources for implementing some provisions of rate regulation is not a sufficient excuse to delay action on implementing all rate regulation . . . After waiting four years and enduring monopoly pricing and rate gouging, consumers were told by the FCC on April 1 that relief was in sight. Now those rate reductions are being snatched from the hands of consumers.<sup>96</sup>

The Commission eventually convinced Congress to appropriate more money, and the effective date for rate regulation was moved up to September 1, 1993.<sup>97</sup>

Nevertheless, the debate over the 1992 Cable Act's rate regulation provisions intensified and heated discussions over the Act shifted from a fray between the FCC and cable operators to a confrontation between the FCC and Congress. The two factions that had begun on the same side—the FCC and Congress—were now ready to do battle, all ostensibly for the benefit of the cable consumer. By September, the debate reached new heights as word reached Capitol Hill that despite the implementation of the rate regulations, cable television rates were actually going up.<sup>98</sup>

## E. Congress versus the FCC

Weeks before the September 1, 1993 effective date of the Commission's rate regulations, various reports in the news media surfaced alleging that many con-

<sup>86</sup> *In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, Order*, 8 FCC Rcd. 3652, para. 2 (1993).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* (concurring statement of Commissioner Andrew C. Barrett).

<sup>89</sup> *Rate Regulation Deferral*, *supra* note 67.

<sup>90</sup> *Id.* para. 1.

<sup>91</sup> *Id.* paras. 2-3.

<sup>92</sup> *Id.* para. 2.

<sup>93</sup> *FCC Says It Will Delay Cable Rate Regulation Until October*, FCC REP., June 16, 1993.

<sup>94</sup> *Id.*

<sup>95</sup> *Rate Regulation Deferral*, *supra* note 67, para. 3.

<sup>96</sup> *FCC Says It Will Delay*, *supra* note 93.

<sup>97</sup> *In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Order*, 58 Fed. Reg. 41,042 (1993).

<sup>98</sup> Michelle Singletary, *Most Area Cable TV Rates Rise Today Under New Rules*, WASH. POST, Sept. 1, 1993, at A1.

sumers' cable rates would rise.<sup>99</sup> Although FCC Acting Chairman James Quello characterized the reports as an "industry spin,"<sup>100</sup> cable operators argued that many customers would indeed face increases.<sup>101</sup> For example, basic cable rates in the Washington, D.C. metropolitan area reportedly increased by almost 10%.<sup>102</sup> The increases for basic service ranged from 34.8% in Prince George's County, Maryland to 19.1% in Howard County, Maryland.<sup>103</sup> Increases for the more popular tiers of service reportedly were as high as 15.8% in Fairfax, Virginia.<sup>104</sup> In the aggregate, one-third of the cable systems surveyed had increased rates.<sup>105</sup> Cable operators in Baltimore, Maryland anticipated raising rates for 40% of their subscribers.<sup>106</sup> Cable systems on the west coast were also preparing to make cable subscribers pay more. Reports speculated that as many as 100,000 of San Diego County's 650,000-plus cable customers were likely to see rate hikes.<sup>107</sup>

Not surprisingly, consumers were not reticent in voicing their outrage. Complaints poured into the FCC and Capitol Hill, prompting Representative Markey to act. Initially, the blame was placed on cable operators. In early September 1993, Markey charged "[t]he [cable] industry [with] attempting to evade the intent of the [1992 Cable Act] by continuing to raise rates."<sup>108</sup>

By late September 1993, however, Markey turned his focus away from the cable industry and to the FCC, demanding that the FCC explain why the 1992 Cable Act went awry. Markey solicited members of Congress to sign a letter urging the FCC to reassess its new rate regulations.<sup>109</sup> Markey asserted

that because "[Congress has] begun to see how some operators are increasing rates instead of lowering them, and essentially avoiding the rate reductions called for in the regulations . . . the FCC should adjust the rate regulations to protect consumers."<sup>110</sup> All told, 130 members of Congress wrote Acting FCC Chairman James Quello to express their deep concern over rate increases. "[I]t appears that a number of cable companies are planning to raise, rather than lower, their cable rates. Such a perverse result forces us to question whether these rate increases reflect a flaw or loophole in the Commission's regulations."<sup>111</sup>

On September 28, 1993, the House Telecommunications Subcommittee conducted an oversight hearing to ascertain the effectiveness of the 1992 Cable Act.<sup>112</sup> Although not a trial *per se*, the tone of the hearing was adversarial, as all three FCC Commissioners took the stand to defend the Commission's regulations.<sup>113</sup> On one side were the embarrassed and angry legislators, represented by Markey, who had continually promised constituents lower rates. Republicans on the subcommittee were eager to characterize the 1992 Cable Act as "one of the worst public policies devised, crafted, and enacted by Congress," that is "failing painfully, miserably and publicly."<sup>114</sup> Democrats on the subcommittee also expressed their concerns. Markey insisted that cable rate regulation was not supposed to result in higher rates for the first year,<sup>115</sup> and yet cable operators were claiming that subscribers will pay more. According to Markey, the FCC was partly to blame.<sup>116</sup>

On the other side of the debate, the FCC Commissioners argued that the Commission's rules did

<sup>99</sup> *Id.*; Christopher Stern, *MSO's Say Rate Reg May Raise Some Cable Bills*, BROADCASTING & CABLE, Aug. 9, 1993, at 16.

<sup>100</sup> Kim McAvoy, *Quello Blasts Rate Hike Stories*, BROADCASTING & CABLE, Aug. 23, 1993, at 53.

<sup>101</sup> Stern, *supra* note 99, at 16.

<sup>102</sup> Singletary, *supra* note 98, at A1.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> LaWanda Edwards, *Baltimore's Cable Television Stations Switch To Fed Mandated Cable Rates*, WARFIELD'S BUS. REC., Sept. 3, 1993, at 13.

<sup>107</sup> James W. Crawley, *Many Cable Customers To See Hikes, Not Cuts*, SAN DIEGO UNION-TRIB., Sept. 1, 1993, at A1.

<sup>108</sup> Brooks Boliek, *Markey Irked By Cable Hikes; Lawmaker Prepping Probe, Says Raising Rates 'At Odds With Spirit Of Law*, HOLLYWOOD REP., Sept. 2, 1993, at 4.

<sup>109</sup> Brooks Boliek, *Markey: Reopen Cable Case*, HOLLYWOOD REP., Sept. 22, 1993, at 4.

<sup>110</sup> *Id.*

<sup>111</sup> Cindy Skrzycki, *Lawmakers Lean on FCC Over New*

*Cable Rules*, WASH. POST, Sept. 25, 1993, at C1; *see also* COMM. DAILY, Sept. 27, 1993, at 8 (statements by U.S. Reps. Oxley (R-Ohio) and Fields (R-Tex.) stating letter "is nothing more than an attempt to shift the blame for the 1992 Cable Act debacle" to the FCC).

<sup>112</sup> *Oversight Hearing on the Implementation of the Cable Television Consumer Protection and Competition Act of 1992 and Provisions Implementing Rate Regulation Before the House Subcomm. on Telecom. and Finance*, 103d Cong., 1st Sess. 1 (1993) [hereinafter *Oversight Hearing*].

<sup>113</sup> One publication described it as "opponents clash[ing] . . . [a] sparring match" over the 1992 Cable Act. Dennis Wharton, *Rereg Rehashed in Capitol Fray*, DAILY VARIETY, Sept. 29, 1993, at 14.

<sup>114</sup> *Id.* U.S. Rep. Michael Oxley (R-Ohio) stated "President Bush is starting to look pretty good right now," referring to the former President's original veto of the 1992 Cable Act, which eventually succumbed to the only Congressional override of the Bush administration. *Id.*

<sup>115</sup> Henry Gilgoff, *Benefit of New Cable Law Unclear*, NEWSDAY, Sept. 29, 1993, at 7.

<sup>116</sup> *Id.*



not go astray on the issue of rate regulation. Acting Chairman James Quello stated that it would be premature to pass judgment on the 1992 Cable Act or the rate regulations passed by the Commission until specific data had been compiled. It would be unwise, said Quello, to "speculate, or perhaps worse, act precipitously based on anecdotal and possibly flawed information" from the news media.<sup>117</sup> As a result, the Commission authorized a cable rate survey of the rates charged to subscribers before the September 1, 1993 effective date of the new rate rules.<sup>118</sup> According to Quello, the survey would solicit data from the ten largest cable systems, which are controlled by the twenty-five largest multiple system operators serving approximately seventy-five percent of all cable subscribers nationally. The data was to be submitted to the FCC by October 1, 1993.<sup>119</sup> "There's been some creative pricing going on," Quello conceded, and "we've got to find out what rates have gone up and what rates have gone down and why."<sup>120</sup>

When the preliminary results of the rate survey arrived in mid-October, 1993, some, but not all, of the confusion dissipated. The Commission declared that since the rate regulations had gone into effect "a substantial number of subscribers" saw rate decreases.<sup>121</sup> Specifically, the figures showed that while 31% of cable consumers suffered higher rates, 68% of cable consumers actually saw a decrease in their rates.<sup>122</sup> These figures, however, represented only fourteen of the twenty-five companies surveyed. The FCC withheld the remaining data because "the other eleven companies have so radically altered their programming and price structures that the agency could not draw firm conclusions about which way their prices have gone."<sup>123</sup> Critics contended that the Commission's survey was wholly inadequate because the reported results from fourteen of the twenty-five cable companies only accounted for eight million out of fifty-seven million subscribers. Some critics charged that the FCC had selectively used information to support its argument that rates had not

increased.<sup>124</sup>

Congress also agreed that the survey was deficient. Republican legislators claimed that because thirty-one percent of cable bills increased, it was a clear indication that current FCC procedures were "not what Congress had in mind" when it passed the 1992 Cable Act.<sup>125</sup> Even Markey, who had recently expressed support for the Commission and its policies, was dissatisfied. Following the release of the "preliminary findings," Markey responded by ordering another survey to be conducted by GAO.<sup>126</sup> In response, the FCC stated that it would have a more complete survey by November 4, 1993.<sup>127</sup>

### III. WHAT WENT WRONG

#### A. Poor Draftsmanship or Creative Pricing?

Given the confusing, and often times contradictory, information released by the Commission and the media, it is difficult to assess whether the FCC's rate regulations have been effective or not. One conclusion, however, is inescapable—some cable rates have increased. The mere fact that rates have gone up is puzzling to both advocates and opponents of the 1992 Cable Act. As Markey stated at the September 28, 1993 oversight hearing, "[w]hile opponents to the Cable Act predicted that [rate regulations] would increase cable rates during the debate on the bill, never was it suggested that rates would increase as a result of *rate regulation*."<sup>128</sup> So how, in fact, did rates go up?

It is evident that the recent debate, including the oversight hearing, produced no answers.<sup>129</sup> Although cable operators have been accused of violating the rules via creative pricing, the real culprits are Congress and the FCC, who crafted regulations without any real-world knowledge of how cable companies operate, and without endeavoring to reflect on potential loopholes they had created by overlaying telephone-type regulatory concepts on an industry that

<sup>117</sup> *Oversight Hearing*, *supra* note 112, at 5 (statement of James Quello, Acting Chairman, FCC).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> Brooks Boliek, *FCC Wants Cable-Rate Answers*, HOLLYWOOD REP., Sept. 20, 1993, at 4.

<sup>121</sup> *Action in Docket Case—FCC Announces Preliminary Results of Cable Rate Survey* (MM Dkt. No. 92-266), FCC News, Oct. 21, 1993, at 1.

<sup>122</sup> Paul Farhi, *FCC Hedges on Saying Cable Rates Fell*, WASH. POST, Oct. 22, 1993, at B1.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Punitive Actions Possible*, COMM. DAILY, Oct. 22, 1993, at 2 (statement by U.S. Rep. Boucher (D-Va.)).

<sup>126</sup> Paul Farhi, *FCC Hedges on Saying Cable Rates Fell*, WASH. POST, Oct. 22, 1993, at B1.

<sup>127</sup> *Id.* at B6. The Commission released its final report on the cable rate survey on February 22, 1994. *Action in Docket Case—FCC Releases Final Report on Cable Rate Survey* (MM Dkt. No. 92-266), FCC News, Feb. 22, 1994.

<sup>128</sup> See *Oversight Hearing*, *supra* note 112, at 3 (emphasis in original).

<sup>129</sup> In fact, some commentators argued "there was little attempt to pin down [this] central question . . ." WARREN'S CABLE REG. MONITOR, Oct. 4, 1993, at 6.

had never been regulated in that manner.

The FCC's cable regulations established a benchmark level that was to result in a rollback of rates by at least ten percent. This rollback was expected to save cable consumers approximately \$1 billion. The regulations, however, also permitted operators to raise certain prices and change programming tiers as long as the total revenue from the increases was not greater than the cuts required by the regulations.<sup>130</sup> This means that cable operators whose rates were below the benchmark levels could raise their rates to benchmark levels if the increases were offset by cuts elsewhere.<sup>131</sup> The result is that cable consumers who spent the most on more expensive programming tiers or additional equipment, such as remote controls and converter boxes, received lower bills. In contrast, those subscribing to the most basic service were forced to pay a higher monthly rate.<sup>132</sup>

A good example is MetroVision Cable, which serves approximately 66,000 subscribers in Prince George's County, Maryland.<sup>133</sup> As of August 18, 1993, MetroVision charged consumers \$21.45 per month for sixty-seven channels of basic service; a remote control unit cost an additional \$3.00 per month, and service to a second television set cost another \$3.50 per month.<sup>134</sup> Applying the FCC regulations to the above charges produced interesting results. According to these rules, MetroVision could only charge the costs of the remote control and the second television set plus a slight profit of 11.25%.<sup>135</sup> Therefore, users with these items—approximately 75% of MetroVision's subscribers—received a major price decrease. But, according to MetroVision, the prices it charges for basic cable rates are below the FCC established benchmark. Therefore, Metrovision expected to raise rates for basic service from \$21.45 to \$21.98 per month.<sup>136</sup> As a result, subscribers that paid more, saved more. The opposite, however, was not true. Those who subscribed to "bare bones"

cable service received price increases.

The FCC was powerless to act. In November 1993, the Commission did attempt to turn the tide in its favor by sending out letters of inquiry admonishing various cable operators for allegedly violating the *Rate Freeze Order*<sup>137</sup> and evading the FCC's regulations in general.<sup>138</sup> But the Commission and Congress eventually found that their hands were tied because both government bodies had in fact explicitly endorsed this manner of raising rates with the 1992 Cable Act and the FCC's corresponding rate regulation rules.

In response to the Commission's first round of inquiries, cable companies argued that the FCC recognized that cable operators would have to adjust rates for various channel offerings prior to the effective date of rate regulation in order to comply with Commission regulations.<sup>139</sup> Additionally, the FCC concluded that:

[M]any operators are discovering that while their rates . . . are below the reasonable level . . . rates for other services are much too high. In this situation, the FCC's rules permit . . . the cable operator to *increase the rate for the low-priced service* in order to offset the rate decrease that it must make for the high-priced service.<sup>140</sup>

For MultiVision's subscribers in Prince George's County, Maryland, the result was not surprising—seventeen percent of MultiVision's customers experienced rate increases.<sup>141</sup> Subscribers to "bare bones" service, such as customers with the basic tier only and customers with basic, plus the cable programming service tier, suffered increases.<sup>142</sup> Subscribers with additional remote controls, additional converter boxes, and/or additional outlets, however, received a rate deduction.<sup>143</sup>

Another problem arose from what has become known as "a la carte" pricing. "A la carte" pricing occurs when a cable operator takes certain channels out of its basic tier, such as Superstation WTBS, and

<sup>130</sup> *Rate Freeze Order*, *supra* note 75, para. 4.

<sup>131</sup> *Id.* See also Paul Farhi, *New FCC Rules Cut Most Cable TV Bills*, WASH. POST, Oct. 13, 1993, at A1, A8.

<sup>132</sup> *Id.*

<sup>133</sup> Paul Farhi, *Cable Rules Will Raise Some Bills*, WASH. POST, Aug. 18, 1993, at A1, A9.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> See *Rate Freeze Order*, *supra* note 75.

<sup>138</sup> See Aversa, *FCC Queries 35 More Operators on Rate Violations*, MULTICHANNEL NEWS, Dec. 20, 1993. In November and December of 1993, the Commission sent letters to 51 companies in 37 states, asking them to explain a variety of fees and charges. A third batch of letters was also sent out in early

1994.

<sup>139</sup> Letter from John I. Davis, to Roy J. Stewart, Chief, MM, FCC (Dec. 17, 1993); Letter from Thomas Sharrard, Division Pres., Warner Cable Communications, to Roy J. Stewart, Chief, MM, FCC (Dec. 16, 1993); Letter from Gardner F. Gillespie, Attorney for C-TEC Cable Systems of Michigan, Inc., to Roy J. Stewart, Chief, MM, FCC (Dec. 17, 1993) (contact the Mass Media Bureau for a copy of these letters (202) 632-7000).

<sup>140</sup> Letter from John I. Davis to Roy J. Stewart, *supra* note 139, at 2 n.7 (emphasis added)(citing FCC Fact Sheet on Cable Rate Adjustments, Aug. 20, 1993).

<sup>141</sup> *Id.* at 3.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

offers them separately for an additional monthly charge.<sup>144</sup> Because the 1992 Cable Act requires the regulation of only the basic tier channels and cable programming services, by removing certain channel offerings from the basic tier, and offering them on a per channel basis, a cable operator removes any FCC jurisdiction over such programming and the corresponding rates.<sup>145</sup> "A la carte" pricing also can result in higher rates for customers. CableVision of Central Florida, serving 200,000 subscribers, restructured its rates by using "a la carte" pricing.<sup>146</sup> CableVision dropped its basic and expanded services by one dollar, but removed three channels, American Movie Classics, and Superstations WTBS and WGN, from its basic service tier.<sup>147</sup> Subsequently, CableVision offered those channels in a package deal for \$2.97 a month.<sup>148</sup> Therefore, despite the lower monthly rate, many subscribers paid more to receive the same number of channels.

As before, the FCC and Congress were powerless to act because they themselves had expressed the "belief that greater unbundling of offerings [i.e., "a la carte" packaging] leads to more subscriber choice and greater competition among program services."<sup>149</sup> Therefore, upon receipt of the Commission's letters of inquiry, cable companies simply argued that it was doing what the Commission authorized them to do.<sup>150</sup> The FCC had stated that "restructuring program offerings to provide more 'a la carte' services is not *per se* undesirable, as offering programming on a per-channel basis increases consumer choice, which is one of the goals of the Act."<sup>151</sup> Even Congress made it clear that "one of the prime goals of the legislation is to enhance subscriber choice. Unbundling

[of program services] is a major step in this direction. *Cable operators and programmers are urged to work toward this objective . . .*"<sup>152</sup>

Apparently clutching at its last regulatory straw, the Commission tried to argue that these "a la carte" packages did not offer consumers a "realistic service choice,"<sup>153</sup> because, in effect, the consumer had no choice but to stay with the package because it was less expensive.<sup>154</sup> According to cable operators, however, the gravamen of the Commission's claim was absurd:

The discount for the [a la carte] package, to be sure, makes the package desirable for any subscriber who wants three or four or more of the . . . [a la carte] channels. But it would be a strange perversion of the regulatory process for the FCC to suggest . . . that [a cable operator] must *increase* its price for the [a la carte] package to give subscribers a more "realistic" choice of taking more channels individually.<sup>155</sup>

## B. Epilogue - The Second Rollback

The Commission's final report on its cable rate survey initiated in November 1993, arrived on February 22, 1994.<sup>156</sup> Despite the fact that the survey revealed that regulated rates, on average, actually declined by 5.9%,<sup>157</sup> the FCC, undoubtedly succumbing to congressional and public furor over the last twelve months, modified, among other things, the original benchmark approach for determining regulated rates.<sup>158</sup>

First, the Commission further reduced rates by seven percent.<sup>159</sup> As a result, cable operators must set rates according to their September 30, 1992,

<sup>144</sup> Letter from Gardner F. Gillespie to Roy J. Stewart, *supra* note 139, at 6-7.

<sup>145</sup> Pub. L. No. 102-385, § 623. In order to avoid "a la carte" regulation, however, the cable operator must ensure that (1) the price for the combined "a la carte" package does not exceed the sum of the individual charges for each "a la carte" channel or component service, and (2) the cable operator must offer the channels included in any "a la carte" package to subscribers separately in addition to the collective offering. *Rate Order*, *supra* note 4, paras. 327-329; *Second Rate Order*, *supra* note 6, para. 37 n.46.

<sup>146</sup> Catherine Hinman, *Cable Survey Finds Many Are Paying More*, ORLANDO SENTINEL, Oct. 21, 1993, at A1, A4.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> Senate Report, *supra* note 10, at 77; *Rate Order*, *supra* note 4, para. 327. Cable operators, in response to the FCC's letters of inquiry, argued this very point. See Letter from Thomas Sharrard to Roy J. Stewart, *supra* note 139, at 2.

<sup>150</sup> Letter from Gardner F. Gillespie to Roy J. Stewart, *supra* note 139, at 2.

<sup>151</sup> *Rate Reconsideration Order*, *supra* note 67, para. 35.

<sup>152</sup> *Id.* (emphasis added)(citing S. Rep. No. 92, 102d Cong., 2d Sess. 77 (1992)).

<sup>153</sup> This requirement must be fulfilled by the cable operator in order to avoid regulation of its "a la carte" offerings. The "realistic service choice" standard is satisfied when the cable operator offers the component parts of any "a la carte" package separately in addition to the collective offering. See *Rate Order*, *supra* note 4, paras. 327-329.

<sup>154</sup> Letter from Roy J. Stewart, Chief, MM, FCC to Michael J. Mahoney, Executive Vice-President, C-TEC (Nov. 17, 1993)(contact the Cable Services Bureau of the FCC for a copy of this letter (202) 632-7000).

<sup>155</sup> Letter from Gardner F. Gillespie to Roy J. Stewart, *supra* note 139, at 10 (emphasis added).

<sup>156</sup> *Action in Docket Case—FCC Releases Final Report on Cable Rate Survey* (MM Dkt. No. 92-266), FCC News, Feb. 22, 1994, at 1.

<sup>157</sup> *Id.*

<sup>158</sup> *Second Rate Order*, *supra* note 6, para. 19.

<sup>159</sup> *Id.* The Commission had already reduced rates by 10%

levels, then reduce them by the new seventeen percent "competitive differential."<sup>160</sup> The FCC reasoned that, upon further analysis, it had understated the competitive differential by only weighing systems on the basis of the number of systems subject to effective competition, as opposed to "analyz[ing] the data from all three types of systems [exempt from rate regulation] . . . and . . . us[ing] a qualitative, rather than arithmetic analysis, to determine the differential whose application best approximates the 'reasonable rate' that would be charged by a system that faces effective competition."<sup>161</sup>

Second, and perhaps most important, the FCC also opened the door to regulating "a la carte" packages, which it had declined to do in its first *Report and Order*.<sup>162</sup> The Commission will now balance various factors in determining whether a particular "a la carte" package is violative of the Commission's rules. "A la carte" offerings will have a presumption of validity if several of the following factors are present:

1. the cable operator had offered, or considered offering, "a la carte" packages consisting of nonpremium channels prior to rate regulation;
2. the operator has conducted market research that suggests that introducing an "a la carte" package would be profitable, other than as a means of evading rate regulation;
3. the cable subscriber is free to select which channels will be included in the package;
4. subscribers are given notice that discloses their options, including total price (including related equipment charges) associated with exercising any of these options; and
5. an insignificant percentage or number of channels in the package has been removed from regulated tiers.<sup>163</sup>

By the same token, the FCC also enumerated various factors that would weigh against the unregulated treatment of an "a la carte" package:

1. the "a la carte" package results in avoiding rate reductions otherwise required by the FCC's rules;
2. a significant percentage or number of channels in the package were removed from regulated tiers;
3. the package price is so deeply discounted when compared to individual channel prices that it does not constitute a realistic set of service choices because subscribers will not have any realistic options other than subscribing to the package;
4. the channels taken from regulated tiers have not traditionally been marketed "a la carte";
5. an entire regulated tier has been eliminated and turned into an "a la carte" package;
6. the subscriber must pay a significant equipment charge to purchase an individual channel in the package;
7. the subscriber must pay a "downgrade charge" to purchase an individual channel in the package;
8. the "a la carte" package includes channels that were removed from lower tiers of channels, requiring lower tier subscribers to buy one or more intermediate tiers to receive the same channels;
9. subscribers are automatically subscribed to an "a la carte" package (so-called negative option billing); and
10. affected programmers object to the restructuring of their services into "a la carte" packages.<sup>164</sup>

If the Commission finds that an "a la carte" package was created solely for the purpose of avoiding rate regulation, it will treat the offering as a regulated tier.<sup>165</sup> The operator of such an "a la carte" package would then face either forfeitures or other sanctions.<sup>166</sup>

The 1992 Cable Act's primary objective is to lower cable rates for all cable subscribers. Until now, that objective had not been realized. The opposite is true. The real mystery behind the rate increases can be found in the 1992 Cable Act itself. The Act, and the FCC's subsequent regulations, clearly failed to fully analyze the way in which cable operators do business. Congress oversimplified cable rate regulation so that cable operators could circumvent many rate regulation mandates, in what Chairman Quello has dubbed "creative pricing."

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pursuant to its first *Report and Order* issued May 3, 1993. See *Rate Order*, *supra* note 4.

<sup>160</sup> *Second Rate Order*, *supra* note 6. The competitive differential represents the difference between a "reasonable" rate and a rate charged by a cable operator not subject to effective competition. See *Executive Summary—Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992; Report and Order and Further Notice of Proposed Rulemaking* (MM Dkt. No. 93-215), FCC News, Feb. 22, 1994. It should also be noted that cable operators who wish to charge higher rates may still elect to invoke cost of service procedures.

<sup>161</sup> *Second Rate Order*, *supra* note 6. The three types of systems exempt from rate regulation are systems that have penetration rates of less than 30%, systems that face actual competition,

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and systems that are operated by municipalities. *Id.* See also Pub. L. No. 102-385, § 623(e)(1).

<sup>162</sup> According to the 1992 Cable Act and FCC regulations, only rates for the basic cable service tier and cable programming service are subject to regulation. See 47 C.F.R. § 76.33(a)(1) (1993); Pub. L. No. 102-385, § 623(c).

<sup>163</sup> *Second Rate Order*, *supra* note 6, para. 194. The Commission will find in favor of non-regulation if it can be shown that (1) a channel has traditionally been offered "a la carte," or (2) if the subscriber may select the channels to be included in an "a la carte" offering. *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* para. 194 n.260.

<sup>166</sup> *Id.*

The question now is whether the Commission's *Second Rate Order* will close the floodgates. The FCC has apparently cut cable operators off at the pass by setting the stage for the regulation of "a la carte" packages, and by lowering the competitive differential by seven percent. Nevertheless, the Commission's *Second Rate Order* may not be enough. In fact, back in May 1993, the FCC even denounced "a la carte" regulation as being ineffective. "[R]egulation [of 'a la carte' packages] . . . might be counterproductive. If cable operators are subject to regulation and exposed to complaints simply by combining premium services into an integrated package, they likely will refrain from making such offerings - even when the collective package would be offered at a reduced rate."<sup>167</sup> Such regulation, the Commission stated, "could disadvantage consumers by denying them discounts on packages of per-channel or per-program services and by limiting subscriber access to a greater quantity of premium programming."<sup>168</sup>

Perhaps the problem lies within the very framework for rate regulation. It seems that the Commission viewed "cable rates" as the sum of various, independent parts, consisting of rates for basic service tiers, cable programming service, and equipment. The FCC apparently concluded that cable rate regulation would be effective if the individual parts were simply separated from the whole and their respective rates reduced by ten percent. Unfortunately, this conclusion was fallacious in its conception because rates for the various components mentioned above have always been hopelessly intertwined by cable operators, thus making such a regulatory framework ineffective. For example, lowering rates for the cable programming service tier resulted in higher rates for the basic cable tier. As a result, consumers who subscribed only to the basic service tier saw their rates increase, while those subscribers with additional pro-

gramming and equipment did not. Merely separating the parts, it seems, does not effective regulation make.

That is not to say that the FCC's rate regulations are totally ineffective. Savings have been realized with reductions in equipment charges, such as converter boxes and remote controls. Further, the price cap mechanism is arguably the real utility of the 1992 Cable Act. Before regulation, cable rates skyrocketed three times the rate of inflation.<sup>169</sup> But the price cap mechanism ensures that rate increases parallel rising inflation, thereby preventing arbitrary rate increases from cable operators who later claim inflation is to blame.

Nevertheless, the Commission must begin employing insight into the inner workings of the cable industry in order to stay one step ahead of "creative" cable operators. The *Second Rate Order* could be a step in the right direction. If it is not, however, debate over the 1992 Cable Act and rate regulation will increase far more than rates have.

## V. CONCLUSION

The 1992 Cable Act, lauded as the panacea for exorbitant cable television rates and inadequate customer service, has not been as effective as promised. Poor draftsmanship and a lack of foresight into the actual inner workings of the cable television industry by Congress and the FCC have diluted the 1992 Cable Act's original promise. These mistakes have allowed cable companies to take advantage of various loopholes, resulting in higher cable rates for many consumers. These mistakes also threaten to redefine the 1992 Cable Act not as a breakthrough, but as a backfire.

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<sup>167</sup> *Rate Order*, *supra* note 4, para. 329.

<sup>168</sup> *Id.*

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<sup>169</sup> H.R. Rep. No. 862, 102d Cong., 2d Sess. 55 (1992).

